# Nadler Calls for Repeal of DOMA and a Briefing from House Speaker Boehner During House Hearing

Friday, 15 April 2011

WASHINGTON, D.C. - Today, Congressman Jerrold Nadler (D-NY), Ranking Member of the Judiciary Subcommittee on the Constitution, called for the repeal of the Defense of Marriage Act (DOMA) and supported the Obama Administration's determination that Section 3 of DOMA is unconstitutional and cannot be defended in certain court cases. He also called on Speaker Boehner to explain to the Committee why he believes DOMA is constitutional and worthy of the House's defense of the law in court.

"Rather than defending DOMA in court, Congress should be working to repeal it," said Nadler.

"Far from demeaning, trivializing, or destroying the institution of marriage, lesbian and gay couples have embraced this time-honored tradition and the commitment and serious legal duties of marriage. The exclusion of any married couples from programs like Social Security defies logic," said Nadler. "The fact that DOMA carves out an entire class of married citizens based on sexual orientation also violates constitutional equal protection guarantees," said Nadler.

Congressman's Nadler's full opening statement cites ample precedent for the Obama Administration's position, including similar actions taken by now-Supreme Court Chief Justice John Roberts when he was Acting Solicitor General.

Nadler's complete statement follows:

"Today's hearing is titled "defending marriage," and my colleagues in the Majority undoubtedly will criticize the Obama Administration for deciding that Section 3 of the 1996 Defense of Marriage Act (DOMA) is unconstitutional and cannot be defended in certain court cases.

"The argument that the Administration has somehow acted inappropriately is a red herring: an effort by DOMA's supporters to distract from the real question here, which is whether anyone should be defending this law.

"The Administration has decided that, at least in certain cases, it should not. The Attorney General followed the procedure that we have established, codified in 28 USC Section 530D, for exactly this situation and there are numerous notable examples of prior administrations that, having determined that a law is unconstitutional, have either refused to defend it or affirmatively attacked it in court.

"In the 1990 case of Metro Broadcasting v. FCC, for example, then Acting Solicitor General John Roberts, now Chief Justice of the United States, argued that a statute providing for minority preferences in broadcast licensing was unconstitutional. Despite Supreme Court precedent applying a more permissive standard of review, he argued that strict scrutiny applied. Senate Legal Counsel appeared as amicus in the case, defending the law, which was upheld.

"Clearly there were reasonable arguments that could have been made in defense of the law. Should we excoriate Chief Justice Roberts' efforts as purely political, and worthy of punishment? His view was not vindicated in that case, but may ultimately have resulted in a shift in the law, which makes it additionally clear that what the President has done here is neither unprecedented nor inappropriate.

"What we ought to be exploring in this hearing, and before the House of Representatives engages in time-consuming and costly litigation, is how anyone can justify prolonging the life of this harmful law.

"Speaker Boehner has announced his intent to do so, and before the House charges to DOMA's defense, we should understand the arguments the Speaker believes support his cause, and why he disagrees with the decision of the President, the Attorney General, and federal judges Joseph L. Tauro and Stephen Reinhard, who have considered the question carefully, and with the benefit of extensive legal and factual briefings.

"On April 4th, several of us wrote Speaker Boehner asking for a briefing regarding his planned defense of Section 3. I now ask the Chair of the Subcommittee and full Committee, the Gentlemen from Arizona and Texas, to ask the Speaker to address the Committee and answer questions members on both sides of this question have.

"In ruling that Section 3 of DOMA cannot survive even rational basis review, Judge Tauro pointed out that - in 1996 when this Committee and the Congress considered DOMA - we did not bother to obtain testimony from historians, economists, or specialists in family or child welfare who might have informed our decision regarding the federal interests at stake and how DOMA would affect federal programs.

"Now, however, the executive branch and the courts have done that job for us. At a minimum, we should consider their factual findings carefully before we insist that this law is worthy of the time and expense of a House defense.

"In ruling that Section 3 is unconstitutional, Judge Tauro considered - and rejected - the justifications that Congress gave when it passed DOMA as well as any post-hoc rationalizations given to support the law. For example, he rejected the argument that Section 3 of DOMA is justified by an alleged interest in encouraging responsible procreation, finding that there is no credible support for the notion that gay and lesbian parents are not as capable as their heterosexual counterparts and that excluding the gay and lesbian families from the federal protections of marriage does nothing to promote the stability of heterosexual parents or marriages.

"Equally important for the purposes of DOMA, Judge Tauro found that this type of interest is properly a state - not a federal - concern. The federal government has historically had no role in setting the rules for marriage (or, for that matter, divorce) and, therefore, the federal government has no equivalent interest in regulating the underlying criteria for marriage. My colleagues who claim to be staunch defenders of states' rights should be alarmed by DOMA's unprecedented meddling in marriage.

"DOMA denies only certain legally married couples access to federal laws that factor in marital status, including Social Security and healthcare programs, which secure citizen's health and well-being. The exclusion of any married couples from these programs defies logic; that Section 3 carves out an entire class of married citizens based on sexual orientation also violates constitutional equal protection guarantees.

"Even under rational basis review, the law cannot survive. It certainly cannot survive more searching review, which the Attorney General and President have concluded is the appropriate level of scrutiny for laws that discriminate against gay men and lesbians.

"Facing lawsuits in a jurisdiction with no statements on the question of the appropriate standard of review, Attorney General Holder applied the factors that the Supreme Court has considered when determining whether heightened review is warranted, and concluded that the criteria had been met. While critics may disagree with his

conclusion, it cannot credibly be argued that either he, or the President, have done anything remotely unprecedented and nothing that warrants calls for impeachment or reduced funding for the Department of Justice.

"Nor can anyone who has looked at DOMA's legislative history credibly claim that this law should enjoy the same presumption of validity as most Acts of Congress. The Congressional Record makes perfectly clear that DOMA is intended to express moral disapproval of gay men, lesbians, and their families. Representative Henry Hyde, then-Chairman of this Committee, declared that "most people do not approve of homosexual conduct . . . and they express their disapprobation through the law." During floor debate, Members repeatedly voiced disapproval of homosexuality as "immoral" or "depraved" and argued that allowing gay and lesbian couples to marry would demean and trivialize heterosexual marriage and might prove to the "the final blow to the American family."

"This evidence of the intent of the law being to discriminate against a specific group of people based on prejudice against, or disapproval of that group, is presumptive evidence of denial of equal protection and of the need for heightened scrutiny. The Administration so concluded, and that conclusion compelled a determination that the law could never survive heightened scrutiny, and, therefore, could not be defended as to its constitutionality.

"In 1996, of course, gay and lesbian couples could not marry anywhere in the world. Now, they can marry in five states and the District of Columbia. Couples like Jen and Dawn BarbouRoske who have been together for more than twenty years. In July they will celebrate their second wedding anniversary as a legally married couple in their home state of Iowa. They are raising two wonderful daughters, McKinley and Breanna, who are with their parents here today.

"Or Edie Windsor and Thea Spyer, who began dating in 1965, got engaged in 1967, and finally married in 2007. Thea passed away two years later, after the couple had loved, lived with, and cared for each other for more than 4 decades and after - as Edie, who is a constituent of mine, puts it - "sharing all the joys and sorrows that came their way."

"Far from demeaning, trivializing, or destroying the institution of marriage, these couples have embraced this time-honored tradition and the commitment and serious legal duties of marriage. Rather than defending DOMA in court, Congress should be working to repeal it.

"With that, I yield back the balance of my time."

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